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September 22, 2006

VIA FEDERAL EXPRESS and VIA FAX

Mr. John Baty
Planning Department
San Jose City Hall
200 East Santa Clara Street
San Jose, California 95113-1905

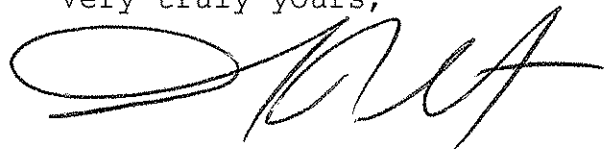
**Re: Evergreen Community Task Force
Proposed General Plan Amendment For Evergreen Village
College Site**

Dear Mr. Baty:

On behalf of and as counsel to Shapell Industries of Northern California, I respectfully request that the enclosed letter addressed to the Evergreen Community Task Force be delivered to the Evergreen Community Task Force and entered into the record prior to the next scheduled meeting which I understand will be held on or about September 25, 2006.

Thank you in advance.

Very truly yours,

A handwritten signature in black ink, appearing to be 'DGR', written over a horizontal line.

DAVID G. ROBERT

DGR:da
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Enclosure

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Evergreen Community Task Force
c/o John Baty, Planning Department
San Jose City Hall
200 E. Santa Clara Street
San Jose, CA. 95113-1905

Statement to Evergreen • East Hill Vision Strategy Task Force

**Proposed General Plan Amendment for Retail Development at Evergreen
Village College Site:**

Dear Members of the Task Force:

On March 15, 2006, I addressed the Evergreen • East Hills Vision Strategy Task Force regarding issues related to the development of a major supermarket on the Evergreen Community College property located at the intersection of San Felipe and Yerba Buena Roads (the "College Site"). The purpose of this statement is to provide the Task Force with a written record of my comments along with additional information.¹

I am outside counsel to Shapell Industries of Northern California, a Division of Shapell Industries, Inc. ("Shapell"). During the past 36 years I have practiced real estate law in California and most of the other parts of the country. I am also a shopping center owner and developer.

During the past 20 years, I have testified on several occasions as an expert witness in real estate litigation at trial, arbitration and alternative dispute resolution. Specifically, I have provided expert testimony in several disputes arising where major

¹ Since I made my comments to the Task Force, a second draft of the Evergreen Development Policy has been issued recommending against the development of a grocery store at the College Site. I wholeheartedly agree with that conclusion. However, since the College is likely to oppose that recommendation, I believe it is necessary to remind the Task Force of the importance of this issue not only to Shapell and other retailers, but to the community as a whole.

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anchor tenants in shopping centers have closed their doors due to declining sales resulting from changes in market conditions, and unexpected competition.

The issues I have testified about also include cases where smaller shop tenants have been forced to close their doors and frequently forced into bankruptcy due to the domino effect of reduced traffic resulting from shopping center anchor tenant closures. I have witnessed and experienced the effects of such closures and base my appeal to you on behalf of Shapell on the results I have seen.

Over the past 22 years that I have represented Shapell Industries, Shapell has developed several million square feet of commercial space including shopping centers and offices. As a seasoned developer and property owner, Shapell presents the Task Force with three serious and legitimate concerns:

1. The direct effect and impact of amending the General Plan so as to allow a 55,000 square foot major market to be installed at the Evergreen Community College site;
2. The inevitable detrimental result on the tenants of the Evergreen Village and Canyon Creek Plaza Shopping Centers if Lunardi's and/or Cosentino's are forced to shut down; and
3. The reversal of the College's original pledge -- which preceded development of the Evergreen Village Shopping Center -- to not develop of a large grocer at the site.

1. THE IMPACT OF A MAJOR MARKET INSTALLED AT THE EVERGREEN COMMUNITY COLLEGE SITE.

In today's marketplace, in light of the construction and land costs, a supermarket or big box user will need to realize sales of at least \$325.00 to \$350.00 per square foot annually in order to break even.

For a new 50,000 square foot store, this translates to over \$18,000,000.00 in annual sales. No major market or big box user will undertake such venture without first having conducted significant research and projections based on demographics, empirical evidence and experience so as to reasonably expect that such sales can be achieved. Assuming then that any such retailer would achieve break even levels, a 50,000 square foot market at the Evergreen Community College site would generate \$18 million to \$22 million or more in sales.

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Where will these dollars come from? They will not come from outside the immediate community; the Evergreen corridor is too remote. By any standard or measure, ***these dollars will be pirated from sales of existing Evergreen corridor retailers.***

The Task Force has been provided a thorough study prepared by highly - respected retail consultant MapInfo, which projects that ***a new 50,000-plus square foot supermarket would result in a loss of sales to both Lunardi's and Cosentino's of between 30% and 40%.***

It is inevitable that such a loss in sales would cause Lunardi's to shut its doors.

We urge this Task Force to consider the results of the MapInfo study. MapInfo is one of the leading providers of demographics and sales projection information to developers, retailers, institutional investors, as well as State and local governments and agencies. MapInfo's studies, analyses and report results form the basis for significant decision making for all of these entities, who invest hundreds of billions of dollars in capital spending, loans and entitlements on the basis of MapInfo's expertise and integrity. Its conclusions cannot be written off as merely the product of a hired gun. MapInfo's reputation would not be what it is if it could be persuaded to skew its results for partisan or advocacy purposes.

2. THE INEVITABLE DETRIMENTAL EFFECT ON SMALLER TENANTS OF EVERGREEN VILLAGE AND CANYON CREEK CENTERS IF LUNARDI'S AND/OR COSENTINO'S ARE FORCED TO CLOSE.

If Lunardi's is forced to shut down due to declining sales and mounting losses at Evergreen Village, and/or if same turn of events causes Cosentino's to close, the majority of tenants in their respective shopping centers would be materially and adversely affected to the point that many of would be forced to shut down and some could face bankruptcy.

This is not idle speculation. It is a virtual certainty, based on 36 years experience in this industry. Good people who have staked their livelihoods and plowed all their savings into businesses in Evergreen Village and Canyon Creek did so with certain expectations, including their ability to benefit from pedestrian and vehicular traffic generated by the anchor tenants. These people and their businesses will surely face disastrous results unless these anchors continue to operate. A General Plan

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amendment permitting, and a development installing, a major super market at the College Site will destroy the Evergreen Village and Canyon Creek Plaza Centers.

It is Shapell's fervent hope that this Task Force will consider the foregoing and give it proper weight before it is too late.

3. THE COMMUNITY COLLEGE'S REVERSAL OF ITS PLEDGE NOT TO DEVELOP A LARGE-SCALE GROCERY STORE.

It is ironic, yet critically important, that the concerns raised by Shapell and others to the Task Force have been characterized by some as partisan and self-interested positions. My testimony is that of an advocate, but it is provided earnestly, on the basis of direct experience and fact. It is important to consider, however, that these same concerns regarding the effect of a large supermarket the College site were acknowledged by the very people who now wish to dismiss them.

A. The College Agreed That Large Scale Retail At The Site Would Harm Other Neighborhood Shopping Centers.

On October 23, 1996, the Community College, acting through its Vice Chancellor Michael Hill explained to the City that it was amending its plans for the site by down-sizing its proposal and precluding any no tenant larger than 20,000 square feet. Hill stated that ***"by excluding a full service grocery operation the revised [general plan] amendment is intended to complement and not adversely impact the commercial village center in the Evergreen planned residential community [i.e., the Evergreen Village Center]."***

These were not the words of Shapell, nor the owners of Canyon Creek, nor any of their representatives. These were the words of the Community College.

These were also the words that Shapell relied on in deciding to move forward with the development of the Village Center. These words constituted a written commitment by the Community College to not locate a major supermarket on its site. When the City of San Jose sought the participation of Shapell to develop the Evergreen Village Shopping Center, this commitment was a primary motivation and source of assurance for Shapell.

Shapell is a seasoned developer, one of the largest developers in the State of California. It would not, under any circumstance, have moved forward with the Evergreen Village Center project without this clear, unequivocal and reasoned

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commitment. In turn, it was on this basis that Shapell was able to attract Lunardi's, Walgreens and others tenant to the Evergreen Village Center.

We are therefore concerned and disappointed to learn that the Community College has stated that its "offer was good for a limited time only." Mr. Hill now alleges that the College did not specifically pledge to always honor its commitment, but claims that the College only intended to honor the commitment for a short period of time. In addition, he believes that the Evergreen Village Center has had enough time to mature in the nine years since the College made its pledge.

The College's reversal and current position are misguided. They ignore the realities of the marketplace. No developer or retailer goes into a project investing tens of millions of dollars looking at a 9-year life span. Lunardi's plans for the long term or not at all. Further, Lunardi's did not open at Evergreen Village Center until November of 2002.

The Community College had a clear, legitimate concern that it acknowledged back in 1996 but no longer recognizes. What has changed? Is the Community College now saying that there are enough new homes and customers to mitigate the diversion of \$18 million-\$20 million in sales from existing retailers? That position is contradicted by the reasoned and supported conclusions of the MapInfo study.

The College has failed to demonstrate what has changed and why its own prior concerns are no longer valid and should now be ignored?

B. The City Previously Disapproved Of The College's Plans

The College was not alone in its determination that a smaller retail presence was appropriate at its site. In fact, the City informed the College on several occasions that a large retail development was counter to the City's planning efforts and inconsistent with the General Plan. In 1995, College first proposed a nearly 200,000 square foot commercial/retail development on 16 acres at the corner of San Felipe and Yerba Buena Roads. At that time, Planning Staff recommended against the proposal, noting that the Village Center was an **"integral component"** of the Evergreen Planned Residential Community. Staff cited a retail demand market study prepared for the Evergreen Specific Plan task force analyzing the balance between supply and demand for retail space in the Evergreen Specific Plan study area. Staff found as follows:

The conclusion of that study found that the area is not only presently overserved with neighborhood serving commercial but would

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continue to be significantly overserved when the Evergreen Specific Plan area is built out. If this current request for neighborhood commercial use on 16 acres were to be approved, ***much of the commercial component of the Evergreen Specific Plan would become useless.*** Since a new commercial center on the Evergreen College site would contain many of the same types of retail uses, ***the stores in the specific plan would become unfeasible.*** In addition, a new commercial center at this time ***could dilute existing consumer markets,*** thereby impacting existing shopping centers along White/San Felipe Road to the north. There is also land designated for neighborhood oriented commercial development as part of the Silver Creek Planned Community and some existing neighborhood commercial uses in the Villages to the south of the site.

1995 General Plan Annual Review Staff Report at 3 (emphasis added). These findings were not made in haste. The same report also recognized that the Evergreen Planned Residential Community was a "detailed plan for the area ... developed through comprehensive participation by area residents and developers" with "oversight direction by a community task force." The Evergreen Specific Land Use Plan was "derived after considerable discussion and public testimony and in consideration of an extensive analysis of land use, service delivery, and environmental issues. *Id.*

In light of these conclusions, the College deferred its proposal until the following year. In 1996, it again proposed a 16-acre commercial/retail development, with 174,000 square feet of commercial/retail space, including a major 35,000 to 60,000 square foot supermarket and a 25,000 square foot chain drugstore. However, Planning Staff again recommended against approval. Staff found that the applicant's request "conflicts with the Goals and Policies of the San Jose 2020 General Plan." 1996 General Plan Annual Review Staff Report at p. 4 (emphasis added). ***"The introduction of sixteen new acres of commercial land could severely impact the planned as well as existing commercial uses in this southeasterly portion of Evergreen."*** *Id.* at p. 3 (emphasis added). Staff made the following findings:

- Two commercial centers were already planned at the time and preparing for construction, including the Village Center as part of the Evergreen Planned Residential Community. A 1990 retail demand study prepared for the Evergreen Specific Plan task force concluded that ***"the area is not only presently overserved with neighborhood-serving commercial but would continue to be significantly overserved with the Evergreen Specific Plan area is built out."*** Staff concluded that if "this current request for neighborhood commercial

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use on 16 acres were to be approved, ***much of the commercial component of the Evergreen Specific Plan could become infeasible.*** Staff Report at p. 4 (emphasis added).

- The proposal for 174,000 square feet of commercial development on the site ***would conflict with the Goals and Policies of the General Plan.*** “General Plan Commercial land use policies indicate that most new commercial development should occur on lands already designated for this use. The General Plan states that the amount of existing land planned for commercial use in San Jose should generally fulfill the need for commercial goods and services. Commercial land use policies state that the creation of new or isolated strip commercial areas should be discouraged. ***Economic studies prepared for potential commercial projects in the area all indicate that this land use change would have the effect of oversupplying existing consumer markets within the market study area.*** Staff Report at pp. 4-5 (emphasis added).

Planning Staff concluded that the addition of commercial square footage at the amounts proposed ***“could weaken existing centers as well as the planned commercial uses in the Evergreen Village Center by oversupplying the retail market. Future commercial needs for the entire Evergreen area were addressed during the planning stages for the residential development. The Village Commercial Center is the planned neighborhood business district intended to be the retail activity and visual hub of the area.”*** Staff Report at p. 5.² Staff recommended against the proposal because a new commercial center would ***“severely impact the planned commercial Village Center,” “would dilute consumer markets for all existing commercial centers within a three-mile radius,”*** and “could impact the semi-rural character of this portion of Evergreen.” *Id.* (emphasis added)

Conclusion

The portion of the College Site proposed for retail/commercial development, together with the adjacent, existing Evergreen Marketplace is essentially the same development as the College originally proposed – and City Staff recommended against – in 1995 and 1996. Despite the interim development, the problems that existed then still remain (see, e.g., the MapInfo study). The College’s proposal seeks to expand

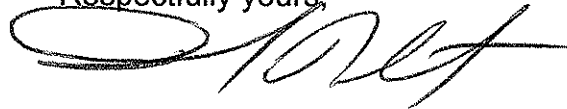
² As previously noted, Lunardi’s only opened in November of 2002. The Village Center spent years in the planning stages, took several years to construct and has only recently begun full operation with many of its tenants still in the process of becoming established.

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commercial/retail development beyond existing commercially zoned lands in conflict with the General Plan and at the expense of specifically planned neighborhood serving retail.

I appreciate the attention the Task Force has devoted to this issue and respectfully submit that it is critical, for the sake and benefit of this community, that the Task Force's final recommendation be against the development of a grocery store at the College Site. Failure to do so will surely lead to disaster for the Evergreen Village and Canyon Creek Plaza Centers, and will subsequently and irreparably harm the surrounding communities.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'DGR', with a large, stylized flourish extending to the right.

DAVID G. ROBERT